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[Remusat v. Bartlett Nuclear, Inc.](#), 94-ERA-36 (ALJ Mar. 1, 1995)

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Date: March 1, 1995

Case No: 94-ERA-36

In the Matter of

CARL M. REMUSAT
Complainant,

v.

BARTLETT NUCLEAR, INC.
Respondent.

Appearances:

Audrey P. Forrest, Esq.
For the Claimant

Kenneth B. Stark, Esq.
For the Respondent

Before: PAMELA L. WOOD
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This is a proceeding brought under the Energy Reorganization Act of 1974 ("ERA"), 42 U.S.C. § 5851, and the regulations promulgated thereunder at 20 C.F.R. Part 24.[1] These provisions protect employees against discrimination for attempting to carry out the purposes of the ERA or of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2011, *et seq.* The Secretary of Labor is empowered to investigate and determine "whistleblower" complaints filed by employees at facilities licensed by the Nuclear Regulatory Commission ("NRC"), who are discharged or otherwise discriminated against with regard to their terms and conditions of employment, for taking any action relating to the fulfillment of safety or other requirements established by the NRC.

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In the instant case, the District Director of the Cleveland, Ohio regional office of the Employment Standards Administration,

United States Department of Labor, found after an investigation that Complainant Carl M. Remusat's termination by Respondent Bartlett Nuclear, Inc. was not based on discrimination; the District Director found that Complainant was terminated because of his failure to follow proper procedures. Specifically, the District Director found that Complainant was terminated because on February 19, 1994, he entered a contaminated area without signing in on the appropriate Radiation Work Permit, and then, on February 22, 1994, Complainant entered a radiologically restricted area without his thermoluminescent dosimeter.

Complainant appealed the Employment Standards Administration's order to the Office of Administrative Law Judges by facsimile transmission which was received on August 15, 1994 and by Western Union Mailgram which was received on August 16, 1994. A hearing was scheduled for September 13 and 14, 1994. Respondent requested a continuance of the formal hearing because it did not receive the request for hearing filed by Complainant, and therefore, Respondent was given less time to prepare for the hearing. On September 19, 1994, the undersigned Administrative Law Judge continued the case. The hearing was held on October 12 and 13, 1994 in Cleveland, Ohio. The parties were given the opportunity to submit post-hearing briefs; Complainant's brief was received on January 4, 1995; Respondent's brief was received on January 5, 1995.

BACKGROUND

Complainant is Carl Mitchell Remusat ("Complainant") who currently resides in Orlando, Florida. Respondent Bartlett Nuclear, Inc. ("Respondent"), whose business address is in Massachusetts, employed Complainant as a junior health physics technician at the Perry Nuclear Power Plant in Cleveland, Ohio.

Respondent is in the business of providing radiological protection services to the nuclear power industry. Specifically, Respondent provides health physics technicians at the junior, senior, and management level. The responsibilities of a health physics technician include determining where the radioactive areas are within the plant, deciding how to deal with radioactive material, determining what kinds of safeguards and protection employees have to use while they are working with radioactive material, and controlling egress and ingress into these radiologically restricted areas. (TR 18).

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Most of Respondent's work is contracted for refueling outages. A refueling outage occurs approximately every 18 months, which varies according to the type of fuel the utility uses. During an outage, the nuclear power plant is shut down and the workers replace the used-up fuel bundles. This work is done around the clock so that the plant can get on-line and start producing fuel as soon as possible. (TR 619).

The health physics technicians' work is conducted primarily

within the radiologically restricted area ("RRA"). To enter the RRA the worker must have a radiation work permit ("RWP"). There are three different types of RWPs. First, the access control radiation work permit (RWP-0) is used when accessing the RRA where no radiological work is performed; the access control RWP number is "0000." Second, a general radiation work permit allows entry to the RRA to perform a broad scope of tasks with minor radiological significance; the access control RWP number used to conduct general radiation work is "6001." Finally, for specific radiation work, specific radiation work permits are issued. (See RX F, p.8).

To enter the RRA, workers must have two types of radiation detectors or dosimeters. (TR 636-637). A thermoluminescent dosimeter ("TLD") is a personal monitor that is required by the Nuclear Regulatory Commission. (TR 634). A Merlin-Gerin ("MG") is a direct reading dosimeter that is required by the Perry Nuclear Power Plant. The MG has a small display that gives a continuous readout of the radiation dose a person receives. The TLD must be read off-site by an independent vendor and is considered much more accurate than the MG. (TR 636-637; see also RX F).

Testimony of the Complainant

Complainant testified that he graduated from Central Florida Community College with an Associates Degree in radiation protection. Complainant's curriculum included radiological courses as well as courses in mathematics and physics. Complainant also worked at an internship at the University of Florida. (TR 42).

Respondent, which is essentially a manpower company, sent Complainant to the Perry Ohio Nuclear Power Plant facility owned and operated by Cleveland Electric Illuminating Company ("CEI"). Complainant testified that Respondent uses a "qualification card" to train its employees to work within a nuclear power plant. Complainant explained that Mr. Craig Mix ("Mix"), who worked for CEI, qualified him, but Complainant emphasized that his

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qualification only took two and one half hours and that he was never fully qualified. Complainant explained that once a junior health physics technician is completely qualified, he or she is permitted to work throughout the plant without supervision. However, a junior health physics technician does not have to be fully qualified in order to work within the plant if he or she is supervised by a senior technician. (TR 49-53).

Complainant testified that when he first started working at CEI in January of 1994, his only job entailed monitoring the PCM-1s which are personal body monitors or frisking devices. (See RX F, RX J). Complainant testified that on several occasions he informed his supervisors that he was not qualified to work with the PCM-1s. Despite his supervisors' assurances of help, Complainant testified that he never received any assistance or guidance while he worked with the PCM-1s. (TR 59-60).

On Saturday February 19, 1994, Complainant reported for work at 7:00 a.m. Complainant logged in at RWP-0 and started working with the PCM-1s. (TR 74). While working with the PCM-1s, Mr. Rick Coco ("Coco"), an employee of CEI and a senior health physics technician, told the Complainant to come with him to conduct a clean survey, which is a survey of the general walkways of the plant. Mr. Phil Fahle ("Fahle"), Complainant's supervisor, verified his assignment. (TR 75-76).

Complainant explained that he was still logged in on RWP-0 while conducting the clean survey even though Coco and the Complainant were within a Radiologically Restricted Area. Complainant and Coco discovered a water spill and started to rope off the spill. Complainant testified that craftsmen, who are welders and pipe fitters, requested H.P. (health physics) coverage. Coco told the Complainant to dress in full protective clothing. (TR 79). Complainant went to Fahle and told him that he was not sure what he was doing; Fahle responded by telling the Complainant that he could only learn the procedures by doing the work and that he would be supervised by the senior health physics technicians. At this time, Ms. Lynn Muelhauser ("Muelhauser"), a senior H.P. (health physicist), started supervising Complainant's work. (TR 83).

After dressing out in full protective clothing, Complainant went back to the fuel handling building. Muelhauser, who was supervising the Complainant from about 100 feet away, motioned for the Complainant to go into a roped-off area. (TR 87-88). Complainant explained that the roped-off area was a contaminated area within the RRA. (TR 97). Complainant informed that this

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particular contaminated area had large hoses full of contaminated water. Complainant's job within the contaminated area was to check the contamination levels of the hoses. Complainant testified that he completed taking smear samples of the hoses to "the best of my ability." Muelhauser stayed outside the contaminated area the entire time Complainant conducted his work. (TR 101-103).

While taking the samples, Complainant testified that one of the hoses that was full of contaminated water broke causing water to spill over one of the craftsmen. Complainant testified that the worker "screamed, 'HP, HP, I'm all crapped up.'" (TR 105). Complainant explained that:

there was nobody I could talk to about it, and he came to me for help and I told him for the most part that he's not going to die, but as soon as we get out of here, he needs to have himself checked and take a shower and seek senior HP help. (TR 107).

Complainant explained that after he "calmed down" the worker, he wanted to practice ALARA, meaning ensuring radiation dose was as low as reasonably achievable, and leave the area of the spill as soon as possible. (See 10 C.F.R. § 20.1003; RX X).

However, Coco, who was working in another section of the contaminated area, came over to the Complainant and told him he must stay in the area until everyone leaves. Complainant emphasized that:

I felt what they taught me in training wasn't complying with what he was telling me now. If he were practicing ALARA, I should have left. (TR 111).

Muelhauser then asked Complainant for his work. Muelhauser reached over the roped off area and took Complainant's smears. (TR 112).

After Complainant left the contaminated area, he went to Mr. Doug Stawick ("Stawick") to ask about the worker involved in the spill. Complainant explained that:

I came out and I told him I had picked up some dose. I was concerned about the guy that had got water on him. I was concerned about the work, my work ability in there, what I had done, where the materials went to, just general safety. (TR 115).

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Stawick responded by asking Complainant what RWP he was on; Complainant informed Stawick that he logged on at RWP-0. Complainant testified that Stawick threw up his hands yelling an expletive and then told Fahle to write up a radiological awareness report ("RAR") on the Complainant. Complainant explained that an RAR is the mildest type of reprimand an employee can receive. (TR 113-116, 118, 347-348; RX Q).

Complainant also testified that Fahle indicated that he would "clear this on the computer." (TR 116). Complainant explained that in his opinion, Fahle was going to erase the two millirems that Complainant received while working within the contaminated area off his badge. Complainant testified that:

I worked right there in the RAFT with the computers, and that's all I worked with, and people would come in there with, like, crazy numbers. They'd throw it in there, zero it out, see you later. (TR 117).

Complainant went to Stephen Lancaster ("Lancaster"), site coordinator, to discuss the RAR. Lancaster explained to the Complainant that he had to be on an RWP. Complainant explained to Lancaster that he was not briefed and was not properly supervised by the senior health physics technicians. Lancaster informed the Complainant that he would help him through this incident and that the Complainant should leave work early. (TR 122-124).

Complainant's next scheduled day of work was Tuesday February 22, 1994. Complainant reported for work at 7:00 a.m.

Complainant walked into the plant with three co-workers and they received their badges. Complainant explained that a badge is an ID card that fits around the employee's neck. Attached to the ID badge is a thermoluminescent dosimeter ("TLD"). Complainant testified that he did not notice that his TLD was missing from his badge. (TR 125-126).

Complainant first reported to Lancaster who emphasized to the Complainant that he must sign in on RWP 6001. Complainant testified that Lancaster also did not notice that his TLD was missing. (TR 127). Complainant then went into the RAFT, which is an RRA, and punched in a code number. Complainant testified that the computer should not have let him log in because his TLD was missing. Complainant testified that "if they pull anything on your badge, it's supposed to void you out of the computer and deny your access. They have computers to do that." (TR 130).

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Complainant went to the employee break room to wait for an assignment. Complainant was assigned to work with Mr. Jerry Bailey ("Bailey") and Mr. Tony Bertuca ("Bertuca"), who were senior health physics technicians, to take air samples. (TR 131-132). Complainant testified that while the senior HPs were showing him the air sampler, he and Bertuca realized that the Complainant did not have his TLD. Bertuca told Complainant to go directly to the RAFT or the trailer, and when Complainant returned to the RAFT, he told Mr. Larry Miller ("Miller") what had happened. Complainant asked Miller if he could cross his name off the log because he did not do any work before realizing that his TLD was missing. Miller permitted Complainant to cross his name off the log. (TR 134).

Complainant returned to the break trailer. Bertuca met Complainant in the trailer and told Complainant that he could not find his TLD. Bertuca decided to call Dosimetry. Dosimetry told Bertuca that it pulled Complainant's TLD. Complainant remained in the trailer the rest of the day. (TR 135-136).

Complainant returned to work the next day, and when he picked up his badge, there was a yellow notice on it informing him that his TLD had been removed. Complainant went to Lancaster to inquire why his TLD had been removed. Complainant testified that:

I went in there and I saw him, and right when I saw him, he was shaking his head no and he pretty much said that it's going to -- 'This is your second screw up and I can't guarantee anything,' and he had walked me off site and he promised me he would help me find another job. (TR 138).

Complainant explained that before he left the plant, he was asked to fill out an ombudsman paper. Complainant testified that he was told that "it would look better" if he resigned. Therefore, Complainant submitted his resignation. (TR 141).

Complainant testified that not having a TLD is a minor offense. Complainant emphasized that under printed Perry Nuclear Power Plant procedures, improper placement or handling or failure to properly store a TLD may result in the initiation of an RAR (Radiological Awareness Report), which is a mild reprimand. (See CX 4; TR 142). Furthermore, Complainant emphasized that on February 22, 1994, he did not receive any notice that his TLD was missing. (TR 145).

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Complainant testified that before he was fired he reported several safety concerns to his superiors. Complainant reported that he was not qualified to work on the PCM-1's; Complainant reported that on February 19, 1993, contaminated water spilled on a worker; Complainant also reported that he was not qualified to do the work on February 19, 1993, and that his MG showed he received two millirems of radiation. (TR 149-150).

Testimony of Anthony Bertuca

Anthony Bertuca ("Bertuca") testified on behalf of the Respondent. Bertuca, who resides in Coloma, Michigan, worked for Respondent at the Perry Nuclear Power plant from January 10, 1994 to July 29, 1994 during the refueling outage. At the beginning of his employment, Bertuca testified that he received "general employment training" which included radiological control training and miscellaneous procedures training. Bertuca testified that it was the responsibility of everyone in the classroom to know the procedures of the Perry Nuclear Plant. (See RX E; TR 463-464, 466).

Bertuca explained that the qualification card would not have to be completed for a junior health physics technicians to work at the plant if the junior HP were supervised by a senior HP. Bertuca opined that Muelhauser's supervision of the Complainant on February 19, 1994 was adequate. Bertuca explained:

[a]s long as you're in eye distance of a worker, a senior technician can let a junior go on with his work. Once you do the work -- it's really repetitive. Once you actually do the work there in that job, that job is going to keep on doing the same thing, checking the hoses, back and forth, smearing the hoses, getting them read, the smears read and everything. (TR 470).

Bertuca explained that on February 22, 1994, he was waiting in the break area of the RAFT for his job assignment. Fahle assigned to Bertuca and Jerry Bailey the job of setting up an area for insulators. Fahle told Bertuca and Bailey to take the Complainant with them and show him how to do the set-up work. Bertuca, Bailey, and Complainant logged in on RWP-6001 and went to the Turbine Power Building. (TR 474, 476).

The group went to get an air sample monitor. Bertuca showed

Complainant how to use the air sample monitor. Subsequently, Complainant, carrying the air sample monitor, walked through a key card door. Complainant handed Bertuca his badge so that he

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could pass through the door; as Bertuca was pinning Complainant's badge back on him, Bertuca noticed that the TLD was missing. (TR 580). Bertuca testified that Complainant responded by saying "I must have dropped it." (TR 481). Bertuca escorted Complainant back to the RAFT. Bertuca told Complainant to notify Miller what had happened. Bertuca then went and completed the work within the Turbine Power Building. (TR 482-483).

After completing the work, Bertuca met Complainant in the employee break trailer, and asked him if he found his TLD. Bertuca decided to call Dosimetry; Dosimetry informed Bertuca that Complainant's TLD was pulled. After informing Complainant that his TLD was pulled by Dosimetry, Bertuca testified that Complainant responded by declaring:

'Well, why don't they notify me or anything of it being pulled?' [Bertuca] said 'Well, don't you have a slip or anything?' [Complainant responded] 'I don't know. Let me check.' [Complainant] pulled out a yellow piece of paper from his coat and showed it to me. (TR 484).

Bertuca informed that the paper was a notice that Complainant's TLD was pulled. (TR 485).

Bertuca discussed this incident with Miller. Bertuca testified that Miller:

told me it's not a big deal because [Complainant] never went into the RRA. I said, 'Well, Larry, that's not exactly true. He was with me. We were all the way down by the other control point.' He said, 'That's not what I was told.' I said, 'well, that's what happened.' (TR 486).[2]

Bertuca also testified that Complainant requested him to cross his name off the work permit dose tracking log because he "did not do any work." (TR 487). Bertuca testified that he told Complainant that he was still in the building and punched in on the computer. Bertuca testified that Complainant said:

'Well, can you guys go over there,' referring to Jerry Bailey and myself, 'and start a new sheet for me?' I said 'no, we can not do that.' Jerry Bailey and I looked at each other and both of us said at the time that we're not falsifying records for anybody. (TR 487-88).

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Testimony of Douglas Stawick

Douglas Stawick ("Stawick") is employed by CEI as a health physics supervisor. (TR 556). Stawick has worked in the nuclear power field since March 1, 1976. (TR 556). Stawick testified that he oversees the plant to make sure it is radiologically safe. Stawick explained that CEI health physicists report to him and he assigns them work, and then, the CEI technicians assign work to Respondent's technicians. (TR 557-558). Stawick explained that a technician who assigns work is referred to as Technician in Charge or TIC. Fahle and Miller are TICs. (TR 559-560).

Stawick testified that on February 19, 1994 he was in the Fuel Handling Building. Stawick observed employees, including the Complainant, working within the contaminated area. Two senior health physics technicians were working with the Complainant. (TR 565-566). Stawick opined that one of the HPs, Muelhauser, was exercising the proper degree of supervision over the Complainant. Stawick explained that Complainant:

was smearing hoses, and hoses were going over to her and they were going in a box, so it sounded to me like a situation where -- which often happens in health physics -- where part of the job is in a contaminated area, part of the job is in a clean area, so you need two HP's. One's got to be inside and one's got to be outside. It's what you need to cover it. (TR 569).

Stawick testified that he saw the Complainant about forty-five minutes later. Complainant reported to Stawick that he had two millirems on his Merlin Gerin ("MG"). Stawick told him to put it on his RWP; when Complainant failed to respond, Stawick asked him what RWP he was on. Complainant indicated that he logged in on RWP-0. Stawick asked the Complainant if he knew that he had to log on an RWP in order to be in a contaminated area. Complainant responded by acknowledging that he did not know that he had to sign in on an RWP in order to work within a contaminated area. (TR 572-573). Stawick emphasized that it is the responsibility of each individual employee to make sure that either the RWPs have been read or that they have been briefed. (TR 564).

Stawick testified that he did not remember whether Complainant told him that he thought his MG was broken or whether he expressed concern about the quality of his survey material. (TR 574). Stawick indicated that the Complainant did mention that one of the workers within the contaminated area got water on

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him. (TR 575). Stawick emphasized that the worker was not contaminated and no personal contamination report was filed out. Stawick also testified that he did not consider two millirems that Complainant received to be a safety or health concern. (TR 575).

Testimony of Stephen Lancaster

Stephen Lancaster ("Lancaster") was employed by Respondent as the site coordinator at Perry Nuclear Power Plant. (TR 617). Lancaster testified that he worked in the nuclear power industry as a junior health physics technician for two years, as a senior health physics technician for four years, and as a planner for two years. (TR 621). Lancaster's present position is a site coordinator and a senior radiological engineer. (TR 617). Lancaster explained that he does not govern the day-to-day duties of the employees. Lancaster handles the administrative duties including the hiring and firing of employees. (TR 659).

Lancaster testified that hiring the Complainant was based, in part, on Complainant's resume. Complainant had an Associates Degree in Radiation Protection Technology. Complainant also participated in an internship; Lancaster considered that the Complainant, therefore, had practical experience. Lancaster emphasized:

Internship means to me that he did hands-on stuff. He performed these radiation surveys, he performed these air samples, took smears, swipes, water samples, which get into a chemistry area. Not only was he familiar with the instruments that we use like the bicron, the RO-2, and not only does he use them, but he was also familiar enough to calibrate those same meters. (TR 655).

Lancaster emphasized that the Complainant, based on the resume he submitted to Respondent, had excellent qualifications for a junior health physics technician. (TR 656).

Lancaster informed that Respondent hired about two hundred and fifty people for the outage at the Perry Nuclear Power Plant. Lancaster emphasized that new employees do not necessarily require experience. Depending on the new employees' experience, they are either given procedure training only or both procedure training and training within the plant. Lancaster emphasized that after employees have received the proper training, he has never encountered any difficulties with them understanding the

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various requirements for entering the RRA. (TR 625).

Lancaster explained that for an employee to enter an RRA, he or she must have a radiation work permit. A radiation work permit is a mechanism used to conduct work in a radiologically restricted area. It sets the definition of work, which is the description, the type of clothing to be worn, the dosimetry to be worn, and any special provision that a worker needs to know for that job. Lancaster informed that RWP-0 is an incidental tracking RWP used for travelers in the plant inside the RRA; Lancaster emphasized that no work is supposed to be done on RWP-0. An employee is supposed to read or be briefed on a specific RWP. An employee should know which RWP to read by the type of work assigned and should understand all the requirements on that RWP, sign in on it, and do whatever it allows one to do. The requirements of the RWP are specifically listed on the dose

tracking log. (TR 646-648).

On February 19, 1994, the Dosimetry Office called Lancaster to review the RAR written on the Complainant. Lancaster was concerned about the note by Stawick on the RAR (Radiological Awareness Report) which indicated that Complainant did not know he was supposed to be on an RWP when in a contaminated area. Lancaster decided to meet with Complainant and discuss this problem. (TR 663-665). After this meeting, Lancaster told Complainant that his TLD would be pulled, and that he should leave work early because he would not be able to do any work without his TLD. (TR 667). Lancaster explained that it was normal procedure to have a TLD removed. Lancaster testified that:

it was pretty normal practice for situations like this. If we did not know up front what had broken down, we would restrict that person from entering the RRA until we found out and fixed it. We didn't want repeats. (TR 667).

The only further formal disciplinary action against Complainant was a memo written by Lancaster to Mr. Craig Reiter, radiation protection manager, indicating that Complainant was coached and counseled. Lancaster emphasized that it was not "any big-time deal." (TR 670; RX Y). Furthermore, Lancaster testified that the amount of supervision Complainant received on February 19, 1994 was adequate. Lancaster testified that:

[Complainant] was in line of sight. Ms. Muelhauser was able to give him enough hand signals that he knew what

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to do. Upon completion of his task, he actually handed her the smears, which tells me they were pretty close to each other. There is only a rope barrier between her and him, nothing else. They were in full view. (TR 653).

On February 22, 1994, Complainant reported to Lancaster when he arrived at work. Lancaster talked to Complainant about the RWP structure and procedures. When Lancaster met with Complainant, he did not notice that Complainant's TLD was missing. Complainant left Lancaster's office and proceeded to the RAFT. (TR 670-671).

On the following morning, Dosimetry informed Lancaster that Complainant had entered the plant while his TLD was pulled. (TR 671-672). Dosimetry noticed a discrepancy in the records because Complainant had lined out the RWP dose tracking log, but the RMS computer system showed he had been in the plant for thirteen minutes. An RAR was written up concerning this incident. (TR 675; RX AA).

Lancaster again met with Complainant to discuss the second RAR. Lancaster testified that he took notes during the meeting. (See RX U.) Complainant told Lancaster that he had signed in on the RWP dose tracking log, gone to the

trailer break room, returned to the RAFT, logged in on the RMS computer system, sat in the RAFT break room for thirteen minutes, then logged off the RMS computer, lined out the RWP dose tracking log and remained in the trailer the rest of the day. (TR 677-678). Lancaster explained that the RAFT was a "gray area," in that while the RAFT is technically an RRA requiring a TLD, the RAFT break room was a clean area. Thus, Lancaster said that if Complainant made "a quick jaunt in and back out again without the badge," it "would have been okay," although technically he crossed the physical boundary for the RRA. (TR 679-681). Lancaster then discussed the incident with Bertuca. Bertuca told Lancaster, contrary to Complainant's claims, that Complainant had entered and gone to the other side of the plant inside the RRA. (TR 681-682). Lancaster decided to terminate Complainant's employment. Lancaster testified that:

When I found out that he was not being truthful with me, and you tack on the RAR's, I summed up that I didn't have a reliable, trustworthy person in my employ. (TR 682).

Lancaster gave Complainant an ombudsman exit interview report, which is a form that gives the employee a chance to

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identify any concerns he or she may have. Lancaster then escorted the Complainant out of the plant. (TR 683, 687; RX V).

Discussion

This case was brought under the Employee Protection Provision of section 210 of the Energy Reorganization Act of 1974, as amended in 1992 (codified at 42 U.S.C. § 5851). Subsection (a) (1) of that statute provides:

No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)--

(A) notified his employer of an alleged violation of this chapter or the Atomic Energy Act of 1954 (42 U.S.C. 2011 *et seq.*);

(B) refused to engage in any practice made unlawful by this chapter or the Atomic Energy Act of 1954 [42 U.S.C.A. § 2011 *et seq.*], if the employee has identified the alleged illegality to the employer;

(C) testified before Congress or at any Federal or State proceeding regarding any provision (or any proposed provision) of this chapter or the Atomic Energy Act of 1954 [42 U.S.C.A. § 2011 *et seq.*];

(D) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended [42 U.S.C.A. § 2011 *et seq.*], or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;

(E) testified or is about to testify in any such proceeding or;

(F) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended [42 U.S.C.A. § 2011 *et seq.*].

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42 U.S.C.A. § 5851(a)(1).

To sustain a discrimination claim under the Whistleblower Protection Provision of the Energy Reorganization Act, the Complainant must prove, by a preponderance of the evidence: (1) that the party charged with discrimination is an employer subject to the Act; (2) that the complaining employee was discharged or otherwise discriminated against with respect to his compensation, terms, conditions, or privileges of employment; and (3) that the discrimination arose because the employee engaged in protected activity. See *Deford v. Secretary of Labor*, 700 F.2d 281, 286 (6th Cir. 1983). [3] As amended in 1992, the Act requires a showing that the protected activity was "a contributing factor in the unfavorable personnel action alleged in the complaint." 42 U.S.C.A. § 5851(b)(3)(C). Relief may not be ordered if the employer demonstrates by clear and convincing evidence that it would have taken the same action in the absence of protected activity. 42 U.S.C.A. § 5851(b)(3)(D).

It is not in dispute that Respondent is an employer subject to the Act, and that Respondent discharged or otherwise discriminated against the Complainant, that is, that Respondent terminated Complainant's employment on February 23, 1994. (See Respondent's Brief at p.23). Thus, it must be determined whether the Complainant engaged in protected activity, whether the termination was motivated, at least in part, by such activity, and whether Respondent would have terminated the Complainant absent the protected activity.

Protected Activity

Respondent argues that Complainant did not engage in any protected activity under the Act, but the record indicates otherwise. Complainant testified that prior to his termination, he reported several safety concerns to his superiors. Complainant testified that he told his supervisors that he was

not qualified to work with the PCM-1's, he reported on February 19, 1994 that a worker had contaminated water spilled on him, he complained to his supervisors on February 19, 1994 that he was not qualified to check the contamination levels of the water hoses and that while he did this work he did not receive adequate supervision from the senior health physics technicians, and he reported that he received two millirems of radiation while working within the contaminated area on February 19, 1994. (TR 114, 149).

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Respondent argues that Complainant did not contact the Nuclear Regulatory Commission ("NRC") until after his employment was terminated, and therefore, Complainant did not engage in any protected activity prior to his termination. However, section 5851 of the Act was recently amended to include internal complaints as protected activity. The Act states that an employee has engaged in protected activity if that person "notified his employer of an alleged violation of this Act or the Atomic Energy Act of 1954." 42 U.S.C.A. § 5851(a)(1)(A). The amendment to the Act codifies the position of several United States Courts of Appeals, including the Sixth Circuit, as well as the Secretary of Labor, that reporting safety complaints internally is protected activity. *See, e.g., Jones v. Tennessee Valley Authority*, 948 F.2d 258, 264 (6th Cir. 1991) (noting that an employee who is retaliated against for filing internal reports concerning violations of nuclear regulatory law has recourse under the Act); *Kansas Gas & Electric Co. v. Brock*, 780 F.2d 1505 (10th Cir. 1985), *cert. denied* 478 U.S. 1011 (1986) (holding that internal actions taken by an employee are within the purview of employee protection that is guaranteed under the Act); *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159 (9th Cir. 1984) (holding that the Act applied when internal complaints concerning quality and safety problems are made); *see also Chavez v. Ebasco Service, Inc.*, Case No. 91-ERA-24, Secretary of Labor (November 16, 1992) (ruling that internal safety complaints are sufficient under the Act); *but see Brown and Root, Inc. v. Donovan*, 747 F.2d 1029 (5th Cir. 1984).

Respondent also emphasizes that Stawick, the health physics supervisor of CEI, did not consider his conversation with Complainant, which included a discussion about the worker who had contaminated water spilled on him and Complainant's own radiation exposure and the quality of the work he was performing, as a "safety complaint." However, Complainant's own testimony clearly establishes that he engaged in protected activity. A Complainant's own uncorroborated testimony about an internal safety complaint to a supervisor constitutes protected activity. *Samodurov v. General Physics Corporation*, Case No. 89-ERA-20, Secretary of Labor (November 16, 1993). Furthermore, Complainant's concerns that he was not qualified are in fact corroborated by the handwritten notes taken by Lancaster, site coordinator of the plant and the supervisor who terminated

Complainant's employment, during his meeting with Complainant on February 19, 1994. Lancaster wrote that Complainant:

informed him that he did not feel comfortable

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performing the survey and got tied up in the activities that were going on. Laborers, et cetera, hollering for HP support, a lot of pressure being applied to not slow work promoted the situation . . . (see RX Q; TR 666).

In addition, Stawick testified that Complainant informed him that Complainant was concerned about the worker who had contaminated water spilled on him. (TR 575).

Respondent's argument that Complainant's complaints are not considered protected activity under the Act is based on a too narrow interpretation of the Act. The purpose of the Act is to encourage reporting incidents involving or relating to nuclear safety. The statute should therefore be read broadly because "[a] narrow hypertechnical reading of section 5851 will do little to effect the statute's aim of protecting." *Kansas Gas & Electric Company*, 780 F.2d at 1512. The Act has a "broad, remedial purpose for protecting workers from retaliation based on their concerns for safety and quality." *Mackowiak*, 735 F.2d at 1163. This case involves several informal safety complaints to Complainant's supervisors which clearly constitute protected activity within the Act. *Samodurov v. General Physics Corporation*, Case No. 89-ERA-20, Secretary of Labor (November 16, 1993). The intent of the Act is to encourage reporting the types of complaints Complainant disclosed to his supervisors.

Accordingly, it is determined that Complainant's complaints concerning the adequacy of the radiation safety program in effect at the Perry Nuclear Power Plant, and specifically his complaints that he was not qualified to work with the PCM-1's, that he was not qualified to conduct surveys within a contaminated area, that he did not receive sufficient supervision while working within the contaminated area, that he was concerned about the worker who had contaminated water spilled on him, and finally that Complainant received two millirems of radiation, which he deemed to not comport with the "ALARA" requirement, constitute protected activity within the meaning of the Act.

Reason for Termination

Having shown that he engaged in protected activity and that he was subsequently terminated from his job, Complainant must, as part of his prima facie case, present evidence sufficient to raise that inference that the protected activity was the likely reason for the adverse action. *Dean Dartey v. Zack Company of Chicago*, Case No. 82-ERA-2, Secretary of Labor (April 25, 1983). Direct evidence is not required for a finding of causation. The

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presence or absence of retaliatory motive is provable by circumstantial evidence, even in the event that witnesses testify that they did not perceive such a motive. See *Ellis Fischel State Cancer Hospital v. Marshall*, 629 F.2d 563, 566 (8th Cir. 1980), cert. denied, 450 U.S. 1040 (1981).

The standard of proof to demonstrate that the protected activity was the likely reason for the adverse action was recently amended by Congress in 1992. Complainant must show that the protected activity was a "contributing factor in the unfavorable personnel action alleged in the complaint." 42 U.S.C. § 5851(b)(3)(C). Prior to the 1992 amendments, the standard of proof was established by the Supreme Court in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). Although *Mt. Healthy* involved a 42 U.S.C. § 1983 action, its analysis has been applied to ERA cases. See *Dean Dartey v. Zack Company of Chicago*, Case No. 82-ERA-2, Secretary of Labor (April 25, 1983). According to the Court's analysis in *Mt. Healthy*, the employee has the burden of proof to show that the protected activity was a "motivating factor" for the adverse employment action. *Mt. Healthy*, 429 U.S. at 287. Under new subparagraphs (b)(3)(A) and (C) of the Act, however, the employee must establish that the adverse action was just a "contributing factor" rather than a "motivating factor." Thus, the 1992 amendments to the Act have lessened Complainant's initial burden of proof to show causation.[4]

Complainant in this case has produced evidence demonstrating that the protected activity was a likely reason for the adverse action. Complainant has shown that his supervisors were aware that he engaged in protected activity. On February 19, 1994, Complainant told Stawick that he was concerned about the dose of radiation he picked up while working in the contaminated area, he reported that a worker had contaminated water spilled on him, he was concerned that he was not qualified to work within the contaminated area, and he claimed that he did not receive sufficient supervision from the senior technicians. (TR 115). Immediately thereafter, Stawick realized Complainant failed to sign in on the proper RWP, and an RAR, which is a mild reprimand, was written up on the Complainant. Subsequently, Complainant met with Lancaster, the supervisor who terminated Complainant's employment, to discuss the RAR. Complainant testified that he told Lancaster that he was not briefed or properly supervised by the senior technicians. (TR 124). Complainant's testimony is corroborated by Lancaster's handwritten notes taken during the meeting which reveal that Complainant was concerned about the quality of his work and the working conditions within the contaminated area. (See RX Q; TR 665). Lancaster had

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Complainant's TLD pulled and sent Complainant home from work early.

Clearly, Complainant's supervisors, who were involved in writing up the RAR and the termination of Complainant's employment, had knowledge that Complainant engaged in protected

activity. Complainant voiced safety and quality concerns directly to his supervisors, in particular to Stawick and Lancaster, and then, four days later, Complainant's employment was terminated by Lancaster.

In making a prima facie case, temporal proximity between the protected activity and the adverse action may be sufficient to establish the inference that the protected activity was the motivation for the adverse action. *Goldstein v. Ebasco Constructors Inc.*, Case No. 86-ERA-36, Secretary of Labor (April 7, 1992); see also *Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989) (holding temporal proximity, sufficient as a matter of law to establish final element in a prima facie case). Here, only four days elapsed between Complainant's complaints about safety and quality procedures and his termination of employment. Moreover, an RAR was issued because Complainant logged in on the incorrect RWP, which is a minor procedural error, immediately after Complainant voiced his safety concerns to Stawick. Because of the short period of time, I find that Complainant introduced sufficient evidence to raise an inference that his protected activities contributed to his termination of employment.[5]

Respondent's Reason for Termination

As the Complainant has established a prima facie case, the burden of production devolves upon the Respondent to articulate some legitimate, non-retaliatory reason for the adverse action. *Nichols v. Bechtel Construction, Inc.*, Case No. 87-ERA-0044 (October 26, 1992). The respondent need not prove the absence of retaliatory intent or motive; it simply must produce evidence to dispel the inference of retaliation raised by the Complainant. *Cohen v. Fred Meyer, Inc.*, 686 F.2d 793 (9th Cir. 1982).

Respondent's burden of proof was also modified by the 1992 amendments to the Act. Prior to the amendments, if the employee showed that the protected activity was a motivating factor for the adverse employment action, thereby establishing a prima facie case, the employer had to show by a "preponderance of evidence" that it would have taken the same adverse action. *Mt. Healthy*, 429 U.S. at 287. However, under new subparagraphs (b) (3) (B) and

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(D), the employer must now show by "clear and convincing evidence," rather than by a "preponderance of the evidence," that it would have taken the same unfavorable personnel action.

Respondent first argues that Complainant's "intentional misrepresentations" on his security questionnaire form concerning his military discharge[6] and his unauthorized removal of a qualification card provide clear and convincing evidence that his employment would have been terminated regardless of Complainant's protected activity. (RX C). Furthermore, Respondent also reported that Complainant was previously fired by a part-time employer,

and Complainant reported on his questionnaire form that he left to "look for better job." [7]

The United States Supreme Court has recently held that an employee is not barred from relief based upon an employer's discriminatory acts when the employer discovers evidence of wrongdoing that, in any event, would have led to the employee's termination on lawful and legitimate grounds. *McKennon v. Nashville Banner Publishing Co.*, No. 93-1543 U.S. Lexis 699 (January 23, 1995) (decided under the Age Discrimination in Employment Act of 1967). The Court reasoned that recovery is based on an employer's unlawful motive, and therefore, the employer cannot be motivated by knowledge it did not have at the time the employee was terminated. *Id.*

Accordingly, Respondent's argument and supporting evidence that it would have terminated Complainant's employment in any event for these unrelated matters is given no consideration in deciding this case.

Respondent also articulates three additional reasons for Complainant's firing: (1) he did not follow correct procedures for signing in the RRA on February 19; (2) he went into the RRA without his TLD on February 22; and (3) he was deemed untrustworthy because he lied about the events of February 22 and tried to cover them up. (TR 416-418, 682).

On February 19, 1994, Complainant, after working within a contaminated area, met with Stawick to discuss his work. At this time Complainant reported his safety and quality concerns to Stawick. Stawick told Complainant to put the two millirems that he picked up while working within the area on his RWP. When Complainant failed to respond, Stawick asked him what RWP he was signed in on. Complainant informed Stawick that he logged in on RWP-0. Stawick stressed to Complainant that he had to sign in on an RWP in order to work within a contaminated area. Complainant told Stawick that he did not know that he had to sign in on an

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RWP in order to work in a contaminated area. Stawick ordered that an RAR be issued concerning the incident.

Lancaster also reviewed the RAR. Lancaster testified that he was concerned that the Complainant did not know that he was supposed to be logged in on an RWP while working within a contaminated area. (TR 664-665). Lancaster had Complainant's TLD pulled off his badge, which Lancaster explained was normal procedure after a procedural violation, and sent Complainant home from work early. Lancaster considered the incident as "minor in nature." (TR 663).

Complainant's next scheduled work day was February 22, 1994. Complainant reported for work and picked up his badge; Complainant failed to realize that his TLD was missing. [8] Complainant first met with Lancaster who testified that he "coached and counseled" the Complainant concerning RWP procedures (TR 670). Lancaster emphasized that the incident was not "any

big-time deal." (TR 670). Lancaster testified that he also did not notice that Complainant's TLD was missing. (TR 671). Lancaster testified that he did not remind Complainant that he pulled his TLD on February 19, 1994. Lancaster explained that:

He's an employee. He is not my child. He knew that his TLD was gone. He didn't have it on him. I don't go around every morning, 'Carl, do you remember what I told you yesterday? Well the same thing is happening today.' I don't do that. (TR 701-702).

Complainant was assigned to work with senior technicians Bertuca and Bailey. They were assigned to set up an area for insulators. Complainant went into this work area without his TLD. Prior to beginning work, Bertuca and Complainant realized Complainant's TLD was missing. Complainant went back to the RAFT and told Miller what had happened. Complainant testified that he requested and Miller permitted him to cross off his name on the log. Another RAR was issued pertaining to this incident.

Complainant argues that this was another minor procedural violation. In fact, Lancaster testified:

Q. If someone were to be in the plant without their proper personnel dosimetry, might nothing happen?

A. I doubt it.

Q. In your 15 years of experience, what would happen?

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A. An RAR would be initiated.

. . .

Q. And would that RAR be such that a person would be immediately terminated for it?

A. No. (TR 424-425).

Even though Complainant's mistakes are considered "minor procedural violations," Respondent enabled the Complainant to learn the procedures of the plant through its training procedure classes which Complainant attended. It appears that Complainant failed to learn the procedures of the plant. Complainant testified on cross examination that he received twenty to thirty packets of training material; he was told that he must learn the information and that he would be tested on it. (TR 174-175, 181). The training also included class room lectures and videos. (TR 175-176). However, Complainant testified:

Q. In this training program, you learned that there were three kinds of radiation work permits, didn't you?

A. They probably taught it.

Q. Well, you were required to know it, weren't you?

A. I tried to learn it.

. . .

Q. Did you learn it or didn't you?

A. No. (TR 182).

Complainant acknowledged that it was his responsibility to learn the procedures of the Perry Plant, but he failed to properly study and learn these procedures.

Moreover, Complainant not only committed two procedural errors on consecutive work days, he also was not completely honest with his supervisors concerning the procedural violations, and in fact, attempted to cover up his violations. Bertuca testified that Complainant asked him to falsify the work permit dose tracking log arguing that "he did not do any work." (TR 487-

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488). Lancaster testified that Complainant told him that he did not go into the plant, but Bertuca informed Lancaster that Complainant in fact went into the plant without his TLD. Lancaster testified that he decided to terminate the Complainant because of the two procedural violations and because the Complainant lied to him about going into the plant without his TLD. Lancaster testified that he concluded that he did not "have a reliable, trustworthy person in my employ." (TR 682).

If the employer articulates a legitimate, non-discriminatory reason for its action, the employee, to prevail, must establish that the proffered reason was not its true reason, but instead, a pretext to mask illegal discrimination.

Complainant testified that he failed to sign in on an RWP on February 19, 1994, and that he entered an RRA without his TLD on February 22, 1994. (TR 115, 119, 133-134). However, the evidence shows that both incidents are categorized as minor procedural violations that would not warrant termination. Nonetheless, Respondent has clearly shown that Complainant failed to learn the procedures of the plant and attempted to mislead his supervisors concerning the TLD procedural violation. Bertuca, who was a credible and reliable witness, testified that Complainant admitted he entered the RRA and that with Miller's permission, he crossed a line through his name on the dose tracking log. (TR 134-135). Bertuca also testified that Complainant inquired into falsifying the dose tracking log. Moreover, Lancaster, also a credible and reliable witness, testified that Complainant told him that he never entered the RRA without his TLD; Lancaster's testimony is corroborated by his handwritten notes taken during his conversation with Complainant and which have been admitted into the record. (See RX U). Therefore, I find that Respondent's reasons for its termination of the Claimant are the

true reasons and not a pretext to hide discrimination.

Accordingly, because of Complainant's procedural violations combined with Complainant's attempt to mislead his supervisors concerning working within an RRA without his TLD, Respondent has demonstrated by clear and convincing evidence[9] that it would have terminated the Complainant irrespective of Complainant's protected activity.[10]

RECOMMENDED ORDER

For the reasons stated above, it is recommended that the instant complaint be dismissed.

PAMELA L. WOOD
Administrative Law Judge

Pittsburgh, Pennsylvania

PLW:jmm:mv

[ENDNOTES]

[1] The following abbreviations are used when citing to the record: CX - Claimant's exhibit; RX - Employer's exhibit; ALJX - Administrative Law Judge's exhibit; and TR - Transcript of Hearing.

[2] Even though no objection was made to this testimony, it contains hearsay. 29 C.F.R. § 18.80 *et seq.* Bertuca's recital of what Miller said Complainant said would appear not to be admissible to show Complainant actually made the statement, as Miller is not subject to cross examination, so I give this statement no weight on that issue.

[3] Decisions under section 210 by the Secretary of Labor have included a further element, that the party charged with discrimination knew of the employee's protected activity. *See Hancock v. Nuclear Assurance Corp.*, Case No. 91-ERA-33, Secretary of Labor (December 4, 1992). However, it would appear that this element would be included in a showing that the discrimination arose as a result of the protected activity, since the employer would need to have knowledge of the activity to respond to it.

[4] This is clearly shown by the legislative history of the amendments to the Act. For example, Representative Williams commented that "a new burden of proof is established that makes it more realistic for an employee to prevail in a case of retaliation." 138 Cong. Rec. H11442 (daily ed. Oct. 5, 1992). Representative Ford stressed that the amendments to the Act establish a "less onerous burden of proof." 138 Cong. Rec. H11444

(daily ed. Oct. 5, 1992).

[5] Respondent argues that the amendments of the Act mirror the language of the Whistleblower Protection Act ("WPA"), 5 U.S.A. § 1221, and that cases interpreting the WPA have held that temporal proximity between the protected activity and the adverse employment action does not, per se, demonstrate that the protected activity was a contributing factor to the employment decision. *Citing Clark v. Department of the Army*, 997 F.2d 1466 (Fed. Cir. 1993). Respondent's argument is rejected because the court in *Clark* also noted that the Administrative Law Judge is entitled to "consider the timing of a personnel action relative to knowledge of a whistle blowing disclosure." *Clark*, 997 F.2d at 1472. Furthermore, the court's interpretation of the WPA in *Clark* was based on that specific act's legislative history. In this case, Respondent's analysis would actually increase the burden on the Complainant to establish that the protected activity was a contributing factor in the discharge decision, which is contrary to the legislative history of the ERA amendments.

[6] Complainant reported on the questionnaire form that he received an honorable discharge. Complainant testified that he was discharged from the military for medical reasons. (TR 152). The record shows that Complainant's discharge was "under honorable conditions (general)." (RX DD). This is a minor difference and not considered an "intentional misrepresentation" as Respondent argues.

[7] Respondent's evidence to show Complainant was fired from his previous employment is a form that Respondent sent to the former employer as part of a routine employee background check. (TR 696-697; see RX CC). The reliability of this evidence is questioned because the former employer is apparently out of business. (See Complainant's Brief at p.16). Furthermore, Complainant objected to the introduction of this evidence into the record. (TR 694). At the hearing, I admitted the evidence into the record conditionally. (TR 698). Upon reviewing the Respondent's evidence, which was admitted into the record as Respondent's Exhibit CC, I find that Respondent's form is within the business records exception to the hearsay rule to the extent that it relates to matters completed by Respondent. However, the form was allegedly filled out by a representative of the former employer, and this information also constitutes hearsay and is not within any exception to the hearsay rule. Accordingly, this information is inadmissible into evidence to prove the truth of the matters asserted by the former employer. See 29 C.F.R. §§ 18.801(c), 18.802, 18.805. In considering this claim, I give no weight to Respondent's Exhibit CC.

[8] There is conflicting testimony on whether Complainant had a yellow notice on his badge informing him that his TLD was removed. Complainant testified that no notice was on his badge. (TR 129, 366). Bertuca testified that Complainant pulled the yellow notice out of his coat after Bertuca told Complainant that Dosimetry pulled his badge. (TR 486). Furthermore, Lancaster testified that he did not know whether Complainant ever read the

notice that was allegedly placed on his badge. (TR 537). Based upon Complainant's credible expressions of concern that he receive the lowest possible radiation dose, I find that Complainant was unaware his TLD had been pulled when he entered the RRA.

[9] Clear and convincing evidence is defined by the Sixth Circuit as a "heightened burden of proof." *White v. Turfway Park Racing Ass'n*, 909 F.2d 941, 944 (6th Cir. 1990), citing *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989). The quality of proof is "more than a mere preponderance but not beyond a reasonable doubt." 30 Am. Jur. 2d *Evidence* § 1167 (1967); see also *Aetna Insurance Company v. Paddock*, 310 F.2d 807, 811 (5th Cir. 1962) (upholding jury instruction defining clear and convincing evidence as "the witnesses to the fact must be found to be credible and that the facts to which they have testified are distinctly remembered and the details thereof narrated exactly and in due order and that the testimony be clear, direct and weighty and convincing, so as to enable you to come to a clear conviction without hesitancy of the truth of the precise facts in issue.")

[10] Although the Radiation Awareness Report (RAR) written up based upon Complainant entering the RAR without having signed in on an RWP was made at the time he first voiced his safety concerns, the RWP which he signed in on was a matter of record, recorded on the computer, so the RAR was in no way dependent on his voicing of safety concerns.